

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE DISTRICT OF HAWAII

3 ANDREW NAMIKI ROBERTS,) CV 18-00125HG-RT
 4)
 Plaintiff,)
 5) Honolulu, Hawaii
 vs.) November 26, 2019
 6)
 RUSSELL SUZUKI, AL CUMMINGS,) (51-1) Plaintiff's Motion
 7) for Summary Judgment;
 Defendants.) (54-1)(1) Defendants Russell
 8) A. Suzuki and Al Cummings'
 Cross-Claim for Summary
 9 Judgment, and (2) Memorandum
 in Opposition to Plaintiff's
 10 Motion for Summary Judgment;
 (62-1) Motion for Leave to
 11 File Amicus Curiae

12 TRANSCRIPT OF PROCEEDINGS
 BEFORE THE HONORABLE HELEN GILLMOR
 13 SENIOR UNITED STATES DISTRICT JUDGE

14 APPEARANCES:

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1 TUESDAY, NOVEMBER 26, 2019 10:39 A.M.

2 THE COURTROOM MANAGER: Civil No. 18-00125HG-RT,
3 Andrew Namiki Roberts versus Russell Suzuki in his official
4 capacity as the Attorney General of the State of Hawaii, Al
5 Cummings in his official capacity as the State of Hawaii.

6 This case has been called for a hearing on Plaintiff's
7 Motion for Summary Judgment, Defendants Russell Suzuki and Al
8 Cummings's Cross-Motion for Summary Judgment and Consent Motion
9 for Leave to File Brief of Everytown For Gun Safety Support
10 Fund as Amicus Curiae.

11 Counsel, please make your appearances for the record.

12 MR. BECK: My name is Alan Beck for the plaintiff,
13 Your Honor.

14 MR. STAMBOULIEH: Stephen Stamboulieh for the
15 plaintiff.

16 THE COURT: Good morning.

17 MR. STAMBOULIEH: Good morning.

18 MR. CREGOR: Good morning, Your Honor.

19 John Cregor, Deputy Attorney General, appearing for
20 Defendants Suzuki and Cummings and the State of Hawaii.

21 MS. BUNN: Good morning, Your Honor.

22 Pamela Bunn appearing for proposed amicus curiae
23 Everytown For Gun Safety Support Fund.

24 THE COURT: Good morning. And I believe we have
25 someone on the phone.

1 MR. TAYLOR: Yes, Your Honor. On the phone Walt
2 Taylor also for proposed amicus curiae Everytown For Gun Safety
3 Support Fund.

4 THE COURT: Good morning, or probably afternoon
5 where you are. Where are you located, Mr. Taylor?

6 MR. TAYLOR: I'm in New York City, Your Honor, so
7 good afternoon.

8 THE COURT: Okay. Good afternoon.
9 Okay. Who is going to speak with respect to the amicus
10 curiae?

11 MS. BUNN: Mr. Taylor, Your Honor.

12 THE COURT: Okay. If you gentlemen and lady would
13 sit down, we will hear from Mr. Taylor with respect to his
14 motion to have the court consider the amicus curiae.

15 You may proceed, Mr. Taylor.

16 MR. TAYLOR: Yes, Your Honor. Thank you, Your
17 Honor.

18 On our motion for leave to file an amicus curiae brief,
19 Everytown For Gun Safety Support Fund has a particular interest
20 in this case, the education, research, and litigation arm of
21 Everytown For Gun Safety, which is the nation's largest gun
22 violence prevention organization with millions of supporters
23 across all 50 states, including thousands in Hawaii.

24 As we state in our motion papers, Everytown has a
25 unique -- has unique information and perspective regarding the

1 Second Amendment, in particular the doctrinal analysis and
2 historical context which may be relevant -- we believe is
3 relevant to the Court's decision.

4 Everytown has filed amicus briefs on the Second Amendment
5 in courts throughout the country including the United States
6 Supreme Court, the Ninth Circuit, and in district courts
7 considering stun gun laws like the very one at issue here.

8 The parties have consented to the filing of this amicus
9 brief which we've attached to our motion papers, and we would
10 request that the Court use its broad discretion here to grant
11 Everytown's motion and allow us to file the brief attached to
12 our September 16th motion, or deem the brief that's
13 filed -- using the brief that's attached filed therewith.

14 So unless the Court has any questions, which I'm happy to
15 answer, Everytown's prepared to rest on our motion and on the
16 arguments in the proposed brief if Your Honor accepts those.

17 THE COURT: Thank you.

18 And it is true, Plaintiff, that you are not opposed to the
19 motion being filed?

20 MR. BECK: We have no opposition, Your Honor.

21 THE COURT: Okay. Mr. Cregor?

22 MR. CREGOR: No opposition, Your Honor.

23 THE COURT: Okay. Very good. The court does grant
24 the motion to have the amicus become part of the record. It is
25 already filed, so I'm not sure it's necessary that we file it

1 separately. But if you feel that it is something that you
2 would like to do, Mr. Taylor, you can do that.

3 MR. TAYLOR: Either way, Your Honor. I'm happy to
4 file it separately or leave it as is. We'll take care of that
5 after the hearing's over.

6 THE COURT: Okay. Very well.

7 MR. TAYLOR: Thank you.

8 THE COURT: Thank you.

9 Okay. Let's proceed with the plaintiff, who I believe
10 filed first, speaking to their motion.

11 MR. BECK: Good morning, Your Honor.

12 My name's Alan Beck on behalf of the plaintiff,
13 Mr. Roberts.

14 The matter before this Court today is the
15 constitutionality of Hawaii's complete ban, even in the home,
16 of electric arms. Electric arms are an arm protected by the
17 Second Amendment per *Heller*. That is because they're bearable
18 on the person and typically used for lawful purposes of
19 self-defense. And for that reason, the -- Hawaii's complete
20 ban on them, even in the home, fills no level of heightened
21 scrutiny.

22 As we have established within the briefing and the
23 defendants have stipulated to, there are at least 4.7 million
24 electric arms currently used for purpose of lawful defense in
25 the United States. That typically fulfills the *Heller*

1 requirement that they be -- that they be -- they be commonly
2 possessed for purposes of lawful self-defense.

3 And to refute the defendant's position that they could be
4 dangerous and unusual, the Ninth Circuit promulgated a test,
5 *United States v. Henry*, for what constituted a dangerous and
6 unusual weapon. And the example they used there was machine
7 guns. Machine guns, the Ninth Circuit found, are unusually
8 dangerous because they're capable of firing many thousands of
9 rounds in the course of a single minute. And for that
10 reason -- and their ownership is, you know, not normal for
11 law-abiding citizens.

12 However, the record here demonstrates that electric arms
13 as a class are less dangerous than -- than handguns, which is
14 the arm that was at issue in *Heller*. And as I mentioned, there
15 are millions of them owned throughout the United States for
16 purposes of lawful self-defense.

17 And because it's a complete ban within the home, our
18 position is that strict scrutiny should apply. And I base that
19 off the fact that -- I base that off the fact that in *United*
20 *States v. Chovan*, the Ninth Circuit promulgated a two-step test
21 which determines the level of scrutiny that should be
22 dealt -- applied within a Second Amendment challenge.

23 The first part is whether something is within the scope
24 of the Second Amendment to begin with. And we -- I establish
25 that with the earlier portion of my argument because it's a

1 complete ban on a bearable arm that's used for purposes of
2 lawful self-defense. Then we fulfill the first step of
3 the -- of *United States/Chovan* Ninth Circuit test.

4 The second part of that test is how much of a burden it
5 is at issue. And here, because it is a complete ban even
6 inside the home, this goes to the very core of the Second
7 Amendment right. And unlike other cases where there may be a
8 waiting period at issue or something that just simply burdens
9 the right to a lesser degree and the Ninth Circuit has applied
10 intermediate scrutiny, here this is a complete ban, a
11 categorical ban on a entire class of protected arms and, thus,
12 we offer that strict scrutiny should apply.

13 And under strict scrutiny, the defendants, the State of
14 Hawaii, has effectively conceded that there's no way for them
15 to justify it because their briefing was fairly sparse on that.

16 And -- however, so I'll focus the argument on
17 intermediate scrutiny. And to satisfy intermediate scrutiny,
18 the Court -- I apologize -- the State needs to establish a
19 important government interest. That they haven't done in this
20 case.

21 They -- other than a -- no argument can be made here that
22 there's any addition to public safety that is apart from, say,
23 the complete -- that would be different than the complete ban
24 that was at issue in *Heller* on handguns. That's because these
25 arms are less dangerous and they serve a unique role because

1 they offer a means of less-than-lethal self-defense.

2 So our position is is that, in fact, striking this ban
3 would, in fact, add to the public safety, the reason because it
4 would allow people to have a less lethal alternative to using a
5 firearm in situations where -- especially if the person is
6 maybe older or simply smaller, where they would need to use a
7 weapon to defend themselves but would prefer not to use a
8 lethal force, even if they might have the legal right to use
9 lethal force.

10 So the same reasons the ban at issue in *Heller* was
11 unconstitutional, in addition to the fact that this is a
12 nonlethal form of self-defense, that we may actually see -- we
13 see no public safety argument. And this is the position that
14 four other courts have found in ruling on these -- on complete
15 bans electric arms in different states.

16 The first one was the Michigan Court of Appeals in *Yanna*
17 *v. State of Michigan*. It struck Michigan's complete ban on
18 electric arms.

19 The -- in New York, *Avitabile*, again, the court applied
20 intermediate scrutiny and found that -- or they actually
21 applied -- they said either under strict or intermediate
22 scrutiny the court could not find a government interest in
23 regulating these arms.

24 And then similarly, in Illinois and in Massachusetts, the
25 state supreme courts for those respective states found a

1 similar -- similar complete bans. They simply could
2 not -- there was no government interest that could justify
3 them.

4 So if I could -- does the Court have any questions
5 regarding the briefing that --

6 THE COURT: Not at this time.

7 MR. BECK: And so I -- that's the core of our
8 argument. And if the Court would allow, I'd like to respond to
9 Mr. Cregor's argument after he's had an opportunity.

10 THE COURT: Thank you, Mr. Beck.

11 Mr. Cregor.

12 MR. CREGOR: Good morning, Your Honor, and may it
13 please the Court.

14 I'm here to argue for the State and the state defendants,
15 and the first thing I want to do is apologize to the Court. In
16 preparing for this argument, I realize that we had not fully
17 complied with the Court's order with regard to the concise
18 statement in that we hadn't fully highlighted our documents.
19 And I would offer, if the Court takes this under consideration,
20 to provide a properly highlighted concise statement of fact
21 after the argument today.

22 With that apology out of the way, let me say that I
23 realize that we have an uphill battle in front of us here; the
24 momentum is against us. But there's no compelling precedent
25 regarding -- or compelling this Court to invalidate Hawaii's

1 electric gun ban. The Ninth Circuit has not said that.

2 Now, we're here on motions for summary judgment. Summary
3 judgment requires that there be no genuine issues of material
4 fact and that the movants are entitled to judgment as a matter
5 of law.

6 As defendants, we've cross-moved because our burden is to
7 show that -- basically that the plaintiffs haven't shown that
8 they have the evidence and that there's no issues of material
9 fact.

10 I'm listening to Mr. Beck's argument and I was struck by
11 this when I read through the briefs again. Their position is
12 that these electric guns are used for self-defense and
13 particularly self-defense inside the home. Now, in *Heller*, the
14 Supreme Court clearly stated that handguns are the favored
15 defensive weapon inside the home. It didn't address electric
16 guns. The only Supreme Court ruling we have on electric guns
17 is you can't say that they're not protected by the Second
18 Amendment because they weren't in existence in 1789, or that
19 they're not uniquely suited for military use. That really has
20 nothing to do with this case at this point.

21 The fact is there is no evidence presented by the
22 plaintiffs that electric guns, Tasers, stun guns, whatever, are
23 indeed used for self-defense or, more particularly,
24 self-defense inside the home.

25 If we look at their briefing, what we have basically is

1 the numbers of electric guns that have been sold --
2 manufactured or sold, subtract the ones that are used by law
3 enforcement, and then we had the leap of faith that whatever's
4 left must be used for defense. There's no evidence of that and
5 that is critical to a Second Amendment analysis under *Heller*.

6 There's certainly -- in fact, there's no evidence that
7 they're used for that. There's certainly no evidence that even
8 approaches their being a favored defensive weapon. In fact,
9 the evidence that's before this Court is that they are used
10 offensively by law enforcement. This is pretty clear
11 throughout all of the documentation and the exhibits, whether
12 that's what they're for, or some of the exhibits that show how
13 people die when Tasered by police which is obviously evidence
14 of their dangerousness -- but that's what they're used for. If
15 they were a class of weapons that are favored or secondarily
16 favored for defense, that might change the issue here, but
17 they're not.

18 So where do we go from there? Well, if they're not these
19 favored defensive weapons, then we don't implicate the core of
20 the Second Amendment, and at best we're at intermediate
21 scrutiny if they are, in fact, even protected by the
22 Second -- or fall under the Second Amendment.

23 Now, the State of Hawaii has a compelling interest in
24 protecting the health and safety of its citizens, and in doing
25 so -- or to do so, I should say, the state has banned electric

1 guns. Now, we have before the Court portions of the committee
2 reports, the legislative history of that statute. Yes, it was
3 passed back in the '70s, but it was reexamined twice since
4 then. It was examined when the statute was amended to allow
5 law enforcement to keep the -- keep and use electric guns, and
6 it was amended later when it was made available for military
7 when acting in a law enforcement capacity or in conjunction
8 with state law enforcement.

9 In each case the legislature found that maintaining the
10 ban was a -- necessary and appropriate for the protection of
11 the citizens of Hawaii. That passes intermediate scrutiny.

12 And let's move to the question of dangerous and unusual
13 which of course is an exception and which has not been defeated
14 here. They don't have to be machine guns to be dangerous. We
15 know that these incapacitate people and on occasions, way too
16 many occasions, have killed people. Just because they're less
17 lethal than firearms or the handguns, which are the favored
18 protection device, doesn't mean that they aren't dangerous.
19 Again, it's a leap of faith to say that they're less
20 lethal -- or because they're less lethal than firearms they're
21 not dangerous. They clearly are dangerous.

22 And because they're not used widely for defense, they
23 remain unusual. They're less unusual than they were in the
24 '70s. They're certainly less -- and they're getting more and
25 more usual, but they remain dangerous and unusual and there is

1 no evidence presented to show that they're not.

2 Although I guess I haven't presented evidence to this
3 particular fact, but it stands to reason that they -- the
4 dangerousness is amplified by the fact that because they don't
5 shoot, they're not firearms, they don't kill people that way,
6 people would be lulled into using them because they think
7 they're less than -- less lethal.

8 We also have presented evidence, though it's limited, that
9 they're capable of being used for torture, that a person who's
10 being Tased, for example, can be repeatedly stunned or someone
11 who has had a stun gun held against him can be repeatedly
12 zapped, to use a common term.

13 So let's move on 'cause I'm going to be brief. I don't
14 have that much to say today. I want to highlight an argument
15 made by the amicus with regard to the numerosity argument. I
16 think the numerosity of stun guns is well-argued, that it's a
17 circular argument, but I'm -- the more I thought about it, he
18 mentioned the federalism argument and the Supreme Court has
19 left gun control much up to the states. I think Justice Scalia
20 had said that federalism is definitely an important part of the
21 Constitution. There's no requirement that I know of that gun
22 control must be uniform throughout the states. It's beyond the
23 Second Amendment.

24 Our legislature has thoroughly examined electric guns
25 three times and reviewed them and determined that they should

1 be limited to law enforcement and the military. It seems it
2 would violate the federalism to say, for example, that just
3 because there are a huge number of electric guns, for
4 example -- just for an example -- in the city of Chicago, that
5 they should be banned in Hawaii because they're not dangerous
6 and unusual. They still are in Hawaii. We don't have to have
7 the same gun control, weapon control laws as the state of New
8 York or the state of Illinois or Michigan. That's left up to
9 the state of Hawaii and our legislature has spoken.

10 And I'm jumping a little bit, but I want to go back to the
11 intermediate scrutiny and just point out that there are less
12 than -- other less-than-lethal alternatives, and because there
13 are alternatives, that does -- I'm not saying that very well.

14 The alternatives point to the fact that these are not
15 necessary defensive weapons even if there had been evidence
16 that they are used that way.

17 So based upon the requirements for summary judgment, the
18 position that there are no genuine issues of fact and that the
19 moving party is entitled to judgment as a matter of law,
20 plaintiff has totally failed in this case.

21 Thank you, Your Honor. Do you have any questions?

22 THE COURT: Not at this time.

23 MR. CREGOR: Thank you.

24 THE COURT: Thank you.

25 Now, Mr. Beck, did you want to speak before I let the

1 amicus speak, or would you rather wait until after I let the
2 amicus?

3 MR. BECK: After the amicus, Your Honor.

4 THE COURT: Okay. Mr. Taylor, you wanted to speak?

5 MR. TAYLOR: Certainly, Your Honor.

6 In our brief, I'll just highlight the points we made there
7 briefly. We have two points we think would interest the Court
8 in giving a more complete picture of the relevant Second
9 Amendment doctrine here.

10 The first is plaintiff contends -- has contended that the
11 law is -- the law here, the stun gun law, electric gun law at
12 issue is categorically unconstitutional under *Heller* because it
13 prohibits a class of arms based on sales data. That's an
14 argument made in their briefs. I'm not sure if they're
15 sticking to it here. He seems to have gone -- relying heavily
16 on strict scrutiny and not the categorical argument.

17 But to the extent the categorical argument remains, no
18 court has ruled this way. No court has said that because
19 something is widely sold or manufactured, it's categorically
20 unconstitutional under the Second -- you know, no federal court
21 of appeals, I should say.

22 This would create -- a rule like this would create
23 perverse -- for example, for gun manufactures, it would allow
24 them to control the Second Amendment by flooding the market
25 with particular firearms. It would impede federalism, as

1 Mr. Cregor mentioned, and it would be really contrary to the
2 self-defense interest that underlies *Heller* and the Second
3 Amendment and is the core of the right.

4 The issue under *Heller* and with the Ninth Circuit cases
5 is about the burden that's placed on the right of self-defense,
6 and a categorical rule that just looks at sales data or
7 manufacturing data and doesn't look at the impact on
8 self-defense is one that could create a lot of dangers both in
9 this case and further into the Second Amendment.

10 I would point out in the *Fyock v. Sunnyvale* case which is
11 a Ninth Circuit decision, the court there was faced with
12 a -- what was -- plaintiffs referred to in that case as a total
13 ban on large-capacity magazine, the magazines overwhelmingly
14 chosen by law-abiding citizens that accounted for roughly
15 40 percent of all magazines was plaintiff's argument in that
16 case.

17 The Ninth Circuit actually accepted for the purposes of
18 the preliminary injunction motion those findings that those
19 magazines were in common use, and the plaintiff had presented
20 sales statistics indicating millions of magazines had been sold
21 in the last two decades in the United States. But the court
22 there, the Ninth Circuit, did not find that that was where it
23 stopped.

24 The court had to go on to do an intermediate scrutiny
25 analysis, and that is -- that is -- that is what the Court

1 should do here as well if it finds that this burdens the Second
2 Amendment right.

3 I'm not going to repeat the arguments on circularity and
4 federalism which are also in the brief and Mr. Cregor has
5 already covered.

6 I would just -- our other argument on plaintiff's
7 argument on strict scrutiny which should really be -- is sort
8 of novel as his argument about a categorical rule that he wants
9 the Court to apply. The Ninth Circuit has never applied strict
10 scrutiny in the Second Amendment case. Only two court of
11 appeals have ever held that strict scrutiny govern the Second
12 Amendment challenge, and both of those cases were promptly
13 vacated, taken en banc, and intermediate scrutiny was applied.

14 Ninth Circuit has told us what it looks to in Second
15 Amendment cases is how close the law comes to the core of the
16 Second Amendment right and the severity of the law on the
17 burden on that right. And the Ninth Circuit has also told us
18 that the core of the right is the right of law-abiding
19 responsible citizens to use arms in defense of their home.

20 And going back to the case *Fyock*, the court there was
21 faced with arguments that, Well, you're taking away every
22 large-capacity magazine and prohibiting me from having that,
23 the argument that This is a class of arms, the argument This
24 takes away my right to use this arm -- this type of arm for
25 self-defense. The Ninth Circuit there rejected that argument

1 saying -- or holding the district court and looking to the
2 other types of weaponry, the other types of magazines, the
3 other types of firearms, including the handgun, which is the
4 quintessential self-defense weapon which is available to the
5 plaintiff in this case, which was available and called for a
6 lesser scrutiny, in that case intermediate scrutiny.

7 So I would -- I would point the Court to *Fyock*. I would
8 also point the Court to the many other cases that even are
9 favorable to plaintiff which he relies on which have all
10 applied in the federal court intermediate scrutiny in these
11 sorts of challenges. There have been, as plaintiff notes, some
12 state courts which have applied -- or seem to apply the more
13 categorical approach, but those cases, as we explained in our
14 brief, are against the weight of authority, against all federal
15 case law which apply intermediate scrutiny just on challenges,
16 and it was directly contrary to Ninth Circuit precedent,
17 including the decisions in *Fyock* and *Duncan*, which have applied
18 intermediate scrutiny with Second Amendment challenges to
19 prohibitions on a type of weapon, in that case large-capacity
20 magazine prohibitions.

21 The final thing I would point to Your Honor to look at is
22 in our brief we also highlight some of the historical record of
23 the prohibition of weapons which are far less deadly than
24 firearms, weapons far less deadly than the firearms -- I
25 apologize there -- regulated in various ways. So this history,

1 if it doesn't have the Court look to sort of the analogous --
2 and I analogize it to sort of the stun gun prohibition here and
3 say this law potentially is outside the scope -- it certainly
4 is a ground for the Court to conclude that intermediate
5 scrutiny is the appropriate scrutiny analysis which the Ninth
6 Circuit has consistently applied and which this Court should do
7 so as well.

8 Thank you, Your Honor. If you have any questions, I'm
9 happy to answer them.

10 THE COURT: Thank you, Mr. Taylor.

11 You wish to speak again, Mr. Beck?

12 MR. BECK: Yes. Thank you, Your Honor.

13 I'll discuss Mr. Taylor's argument first. And the only
14 part that I really want to home in on is that the matter before
15 this Court is significantly different than was before the court
16 in *Fyock*. In *Fyock*, the court found that there was no actual
17 firearm that was banned from use because of the fact that
18 magazines over 10 rounds were -- were banned. There's -- you
19 can use a handgun, rifle, et cetera, for purpose of lawful
20 self-defense with magazines that hold 10 rounds or less, and
21 the record of *Fyock* demonstrated that the average defensive use
22 of a firearm is 2.1 shots.

23 So -- and for that reason, the court found that this was
24 not a severe ban on the right to self-defense because there's
25 these magazines that hold 10 rounds or less, and so no actual

1 firearm was being banned.

2 Here we're dealing with a complete ban on an actual arm.
3 And unlike in *Fyock* where you still could use a firearm of your
4 choice, here we're closer to a complete ban on the use of these
5 arms because there's no alternative for -- for use. So -- and
6 that's why *Fyock*'s distinguishable. And no federal circuit
7 court has dealt with this severe restriction like this on a arm
8 designed for lawful self-defense within the home.

9 So the closest that a court has found is the Seventh
10 Circuit *Ezell* was evaluating -- and Seventh Circuit's adopted
11 the same true step and local tool as the Ninth Circuit has.
12 And *Ezell*, because there was a complete ban on firing ranges,
13 they said that was still close enough that they would use
14 something called New York strict scrutiny, and that's the
15 closest case where this has been a complete ban on the use of
16 firearms for -- I'm sorry -- a complete ban on the right within
17 the home. Even in *Ezell*, that was just simply a case dealing
18 with a firearms trading -- banning firearms trade within the
19 city of Chicago.

20 Now I would like to move to Mr. Cregor's argument.
21 The -- their argument, to a large degree, contradicts their
22 request -- our request for omissions which they've already
23 admitted to in this case. In -- they've already admitted that
24 there are 4.7 million electric arms owned by civilians for
25 lawful purposes in the United States. They can't come back at

1 this later proceeding -- and per Ninth Circuit's precedent,
2 there's a case called *Tillamook* which is in -- cited to in the
3 reply brief -- and go against what they've already admitted to.

4 And in *Heller*, it's -- they have found that it's simply
5 enough that they are being used for lawful purposes in this
6 case for them to receive Second Amendment protection.

7 In this case, you know, the arm very clearly is used for
8 lawful self-defense. They've also admitted specifically the
9 core purpose of a stun gun at least is for purposes of lawful
10 self-defense.

11 So to the extent that Mr. Cregor's argument's going to be
12 given weight today, I'd like -- that needs to be weighed
13 against what the State has already admitted to. And
14 they -- between these two admissions I don't see how they can
15 make a defensible claim that there's a material fact as to
16 whether electric arms are not used for purposes of lawful
17 defense.

18 And additionally, that simply is what they are used
19 for -- I mean, the police departments, et cetera. And the
20 various state courts have -- the various -- the four courts
21 that I mentioned, they've discussed this matter. The only use
22 is for nonlethal self-defense. That's simply what they are
23 designed for.

24 So beyond just simply pointing out the request for
25 admissions, I have no further argument for this Court, unless

1 the Court has any questions.

2 THE COURT: Well, I do have a question. There is a
3 Second Amendment case pending before the United States Supreme
4 Court. They've granted certiorari in *United States* -- excuse
5 me -- in *New York State Rifle and Pistol Association, Inc. v.*
6 *City of New York*, and it's set for oral argument on
7 December 2nd, which is next week. In the briefing before the
8 Supreme Court, parties have raised questions as to the level of
9 scrutiny to apply in cases challenging a statute on grounds
10 that it violates the Second Amendment.

11 So I believe we can look forward to guidance from the
12 United States Supreme Court with respect to what standard we
13 should be using. And I am wondering whether it would not be
14 appropriate to wait, since we have this division in terms of
15 the position of the parties as to what standards should be
16 used, to get guidance from the United States Supreme Court so
17 that we could at that point apply it and thereby avoiding any
18 unnecessary appeals or further briefing, et cetera, with
19 respect to the case as it stands right now.

20 What's your thought on that, Mr. Beck?

21 MR. BECK: Now, this answer may sound -- be somewhat
22 self-serving, but if this Court were to find that this
23 ban -- just like the court in New York did -- does not survive
24 intermediate scrutiny, I wouldn't see why that would be
25 necessary because the Second Circuit in *New York Rifle and*

1 *Pistol Association* applied -- admittedly in upholding the
2 transport law that was in issue, that is at issue in front of
3 the Supreme Court applying intermediate scrutiny, but applying
4 the same form of intermediate scrutiny, the New York District
5 Court found that the Taser ban in the State of New York was
6 unconstitutional.

7 So to the extent that this Court were to find this ban to
8 be unconstitutional under intermediate scrutiny, it seems like
9 it would be redundant to wait upon further guidance from the
10 Supreme Court because nowhere in the briefing has the U.S.
11 Supreme -- I'm sorry -- have the parties before the Supreme
12 Court argued that anything less than intermediate scrutiny
13 would apply.

14 However, to the extent that perhaps this Court might feel
15 that intermediate -- it could uphold this ban under
16 intermediate scrutiny, I suppose there could be an argument
17 that it might want to find -- see if a higher level of scrutiny
18 might be warranted based upon the briefing.

19 But based upon my review of the briefing and of the
20 Second Circuit, nothing less than intermediate scrutiny -- will
21 the Court do something that would make anything less than
22 intermediate scrutiny apply here.

23 THE COURT: If I understand you, you still leave the
24 possibility open that the Supreme Court will say something that
25 is more enlightening. You're saying if I do A, B, and C, it's

1 not a problem.

2 But what I'm pointing out is that we don't know what they
3 will do, and as a federal district court, I am guided by the
4 appellate courts of the circuit I am in and, of course, by the
5 decision of the United States Supreme Court.

6 And I'm pointing out that the very issue that we're
7 talking about is coming up next week before the United States
8 Supreme Court, so wouldn't it be a bit of hubris on my part to
9 think that I can figure that out?

10 MR. BECK: I -- our position is -- and I
11 respect -- I understand the Court's position; however, our
12 position is is that the level of scrutiny before this Court,
13 intermediate scrutiny as applied by the Second Circuit, was
14 already used to strike down the ban at issue in the City of New
15 York -- I'm sorry -- in the State of New York. And it
16 doesn't -- it doesn't make any difference to my client what
17 level of scrutiny or whatever, what form of legal analysis is
18 used for him to at the end of the day be allowed to exercise
19 his -- what we offer as his right to keep a electric arm inside
20 his home.

21 And because the lowest level of scrutiny that would be at
22 issue here is something that's not going to be affected by *New*
23 *York Rifle and Pistol Association*, there's a countervailing
24 interest that my client has -- and this is a civil rights
25 matter -- to have his civil rights decided in a somewhat

1 expeditious manner. And if there was some concern that perhaps
2 the Court's decision might -- you know, might use intermediate
3 scrutiny when maybe *New York Rifle* would compel this Court to
4 apply strict scrutiny, however, with the right being the same,
5 what I would respectfully suggest this Court do is use the
6 exact same rationale that two different courts have used in the
7 State of New York.

8 In the first case --

9 THE COURT: Not my circuit, Mr. Beck.

10 MR. BECK: Yes, I understand that. But the -- New
11 York is the circuit that's being reviewed in front of the U.S.
12 Supreme Court, Your Honor. And because in this situation where
13 we're dealing with somewhat similar scenario, I would
14 respectfully offer that if this Court could simply say that
15 under either strict or intermediate scrutiny, without actually
16 making a final determination on what level of scrutiny would
17 apply -- but even assuming intermediate scrutiny would apply,
18 that this ban is unconstitutional, and that would be in line
19 with every court that has dealt with this very issue, which --

20 THE COURT: Okay. Thank you.

21 MR. BECK: Thank you, Your Honor.

22 THE COURT: Mr. Cregor?

23 MR. CREGOR: May I approach, Your Honor?

24 THE COURT: Yes.

25 MR. CREGOR: As to the Court's question, the

1 argument's next week and it seems to me very prudent to wait
2 until we get some decision from the Supreme Court. The Supreme
3 Court's been known to surprise us in many cases, particularly
4 in important cases, and it may rule way beyond the questions as
5 presented by Mr. Beck.

6 And just because -- so I do urge the Court to defer a
7 little time to see what the Supreme Court does.

8 He seems to argue that it makes no difference because the
9 Second Circuit has already ruled that the ban on electric
10 guns -- excuse me -- does not pass intermediate scrutiny. It's
11 our position that it does pass intermediate scrutiny, and the
12 Court pointed out we're in the Ninth Circuit, and the Ninth
13 Circuit and the Second Circuit have been known to differ at
14 various times in the past and could well look at it
15 differently.

16 I only want to respond to the factual argument that, yes,
17 we have admitted that there are many electric guns in the hands
18 of civilians for lawful purposes. We have not admitted nor
19 have they established that they are in the hands of civilians
20 for self-defense within the home which is the standard
21 enunciated in *Heller* for Second Amendment.

22 With that, I rest on my argument that they have not
23 established the basis for a summary judgment.

24 Any further questions, Your Honor?

25 THE COURT: No. Thank you, sir.

1 MR. CREGOR: Thank you, Your Honor.

2 THE COURT: And, Mr. Taylor, did you wish to speak
3 to the question of the Supreme Court case next week and the
4 issue of staying the matter until they have ruled? Mr. Taylor?

5 MR. TAYLOR: Yes, Your Honor. I do -- I do think
6 that what Your Honor suggested, to wait for guidance from the
7 court argument that's going to take place on Monday, makes a
8 lot of sense given the division and debate here about the
9 standard of scrutiny.

10 I would also mention that there's another case currently
11 where briefing is completed in the Ninth Circuit, *Duncan v.*
12 *Becerra* case, which plaintiffs rely on and cite in their
13 briefing. It was a large-capacity magazine case, so a type of
14 weapon -- a restriction on a type of weapon.

15 The parties there have also debated over what the proper
16 level of scrutiny is for that type of, you know, prohibition or
17 ban, if you will, is what the plaintiffs there call it, on a
18 particular type of weapon. There's an argument like there is
19 in this case that a categorical rule should apply from the
20 plaintiffs or strict scrutiny. The defendants say -- argue
21 either it's not within the scope of the Second Amendment at all
22 or that intermediate scrutiny analysis should apply.

23 So even beyond *NYSRPA* case, which I agree with Your
24 Honor's suggestion, and I also think there might be even after
25 *NYSRPA* a thought to waiting to see what the Ninth Circuit does

1 in that *Duncan* case, but I just wanted to point that out to the
2 Court.

3 THE COURT: Okay. Thank you.

4 I am going to -- I did want to give the parties the
5 opportunity to make their arguments today. We have extensive
6 briefing in this matter, but the court is guided by the Supreme
7 Court of the United States which in six days is going to
8 issue -- not issue -- excuse me -- is going to hear arguments
9 with respect to the central issue here: What is the level of
10 scrutiny that the courts should be doing?

11 So I'm going to stay the matter and I am going to give the
12 parties 45 days after the ruling of the Supreme Court to file
13 any further briefing, if they should choose to file any further
14 briefing, and that includes the amicus.

15 So I believe we will all be interested to hear the
16 arguments next week and then the resulting decision.

17 Thank you. We are in recess.

18 (Proceedings concluded at 11:25 A.M.)

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COURT REPORTER'S CERTIFICATE

I, DEBRA READ, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that pursuant to 28 U.S.C. §753 the foregoing is a complete, true, and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

DATED at Honolulu, Hawaii, December 10, 2019.

/s/ Debra Read
DEBRA READ, CSR CRR RMR RDR